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Supreme Court of the United States

October Term, 1963

No. 16

BANCO NACIONAL DE CUBA,
Petitioner,

against

PETER L. F. SABBATINO, as Receiver, and F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FRERE and HELEN G. DOWNS, co-partners doing business as FARR, WHITLOCK & CO.

BRIEF OF PETITIONER IN OPPOSITION TO MOTION OF COMPANIA AZUCARERA VERTIENTES-CAMAGUEY DE CUBA FOR LEAVE TO BE SUBSTITUTED AS RESPONDENT IN THE ABOVE ENTITLED CAUSE IN THE PLACE AND STEAD OF PETER L. F. SABBATINO, AS RECEIVER

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Dated, October 16, 1963.

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The complaint as amended asserts that Farr, Whitlock & Co. (hereinafter Farr) converted property belonging to the petitioner; it seeks judgment against Farr for the sum of $175,250.69. Respondent Sabbatino was joined as a defendant because at the time of the institution of this action he had been appointed as Receiver of the New York assets of Compania Azurcarera Vertientes-Camaguey de Cuba (hereinafter C.A.V.) under § 977-b of the New York Civil Practice Act. The only relief sought against Sabbatino was a judgment declaring the receivership statute invalid and enjoining the Receiver from exercising any powers pursuant to his appointment (R. 10).

Subsequently, by decision of the New York State Supreme Court in *Schwartz* v. *Compania Azucarera Ver-*

tientes-Camaguey de Cuba, 39 Misc. 2d 63, 240 N. Y. Supp. 2d 247 (Kings Co., 1962), the receivership was vacated. Those portions of the cause of action which seek relief against the Receiver have therefore become moot, and the Receiver has withdrawn from this proceeding.

C.A.V. now seeks to be substituted in the place and stead of the Receiver. It urges that Rule 25(c) of the Federal Rules of Civil Procedure authorize such relief, and that, if the rules be not applicable, it should get such relief under the inherent power of this Court to allow substitution "in the interest of justice" (C.A.V. brief in support of this motion, p. 4).

C.A.V. does not seek to intervene, and claims no rights under Rule 24 of the Federal Rules of Civil Procedure.

POINT I

The Court should not permit the substitution of C.A.V. in the place and stead of Sabbatino.

Actually, C.A.V. is seeking to intervene in this proceeding. If any rule of the Federal Rules of Civil Procedure was intended to cover this type of situation, it is Rule 24, not Rule 25(c). Yet C.A.V. avoids any reference to Rule 24 in its motion, since it obviously cannot meet the requirements either of subdivisions (a) or (b), and it would prefer not to comply with subdivision (c).

Both subdivisions of Rule 24 require timely application, and C.A.V.'s application is untimely. This action was commenced two and one-half years before this motion was made. At any time during that period, C.A.V. could have moved to intervene in the action and to assert any rights it may have as the person ultimately liable. Its power to do so was not at all affected by the appointment of a Temporary Receiver of the assets of C.A.V. *Clark* v. *Propper*, 169 F. 2d 324, 326 (C. C. A. 2, 1948), aff'd 337 U. S. 472,

486, 489; *Sigua Iron Co.* v. *Brown*, 171 N. Y. 488 (1902); *Cohen* v. *Sherman*, 279 App. Div. 939 (2nd Dept., 1952). Its ability to conduct litigation was amply illustrated by the successful litigation it carried on against the receivership in the *Schwartz* case. But instead of intervening when the action was commenced, it withheld taking any steps until the case was pending before this Court on a writ of certiorari. No excuse at all is given for the delay.

Intervention under Rule 24(a) is permitted only when the applicant may be bound by a judgment in the action *and* representation of its interest by existing parties may be inadequate. Both conditions must be fulfilled. *Farmland Irrigation Co.* v. *Dopplmaier*, 220 F. 2d 247 (C. A. 9, 1955). The Court there said, at p. 248:

> A showing that an applicant for intervention will be bound by a judgment in the action is not in itself sufficient to confer upon such applicant a right to intervene; it must also be shown that representation of the applicant's interest by existing parties is or may be inadequate.

See also the Court's consideration of the adequacy of existing representation at p. 249.

Not the slightest effort has been made to show inadequacy of representation here. Indeed, the contrary is true. It appears in the record (although not in the moving papers) that C.A.V. has entered into an agreement by the terms of which it has agreed to hold Farr harmless in the event Farr loses this case. This is because Farr's conversion in the first place was induced by C.A.V. and presumably it demanded a save-harmless agreement for its protection. The save-harmless agreement provides in paragraph 3 thereof that C.A.V. (referred to in the agreement as Vertientes-Camaguey) agrees to "defend at its own cost and expense and by its own attorneys, any suit against Farr, Whitlock & Co. concerning said sugar or the proceeds thereof."

If there were any lack of adequate representation due to Farr's desire to appoint its own counsel to represent it in this Court, such injury to C.A.V. has been prevented by the order of this Court permitting it to submit a brief and to argue on the merits. The brief it submitted bears adequate testimony that it has taken its task seriously, and no one can contend that its rights have not been fully protected here.

Finally, C.A.V. has made no effort to comply with Rule 25(c), in that no pleading setting forth its claim or defense has been submitted. We suspect that this is not simply an oversight. C.A.V. could not have submitted such a pleading without showing that the interest it seeks to protect is its own independent interest and not any interest it derived from Sabbatino.

The question still remains, however, as to whether this Court should, in the exercise of its general power to supervise litigation before it, permit C.A.V. to participate in this proceeding, whether it be as an intervenor or in the place and stead of Sabbatino. We submit that no such leave should be granted. There are no equitable considerations operating in favor of C.A.V. which has been guilty of the most extreme laches in protecting its rights.

C.A.V.'s reasons for wishing to intervene appear clearly from Point IV of its brief on the merits. It seeks not to assert rights which were transferred to it from Sabbatino, but to interpose a counterclaim, and to resurrect alleged issues of fact which two and one-half years ago were decided by the District Court while C.A.V. slumbered. Obviously, it can make no counterclaim since petitioner asserts no claim against it. Certainly, petitioner cannot be compelled to assert a claim against C.A.V. which it does not believe it has and which it is not seeking to assert.

There are no rules of this Court governing the question of the substitution of parties. No doubt, however, the Court

has the power to permit either a substitution or an intervention if such action should be deemed appropriate, to serve the interests of justice. We submit that under the circumstances shown here, there is and can be no such showing. There are no equitable considerations which operate in favor of C.A.V., and its application should be denied.

POINT II

Rule 25(c) of the Federal Rules of Civil Procedure has no application to this case.

Rule 1 of the Federal Rules of Civil Procedure provides that the "rules govern the procedure in the United States district courts." The predominant authority holds that the rules have no application to appeals. In *Hines* v. *Royal Indemnity Company*, 253 F. 2d 111 (C. A. 6, 1958), a motion was made in the Court of Appeals pursuant to Rule 60(b) of the Rules of Civil Procedure. The Court of Appeals held, at p. 113:

> The Rules of Civil Procedure apply to procedure in the District Courts, not to the Court of Appeals.

Again, in *Stewart Die Casting Corporation* v. *National Labor Relations Board*, 129 F. 2d 481 (C. C. A. 7, 1942), relief was requested pursuant to Rule 60. Again, the Court held, at p. 484:

> But these rules, whatever their scope, have no application to the Circuit Court of Appeals.

See also *Nachod* v. *Engineering Research Corp.*, 108 F. 2d 594 (C. C. A. 2, 1939).

Moore, in discussing the very rule under consideration here, points out that questions of substitution are governed by the rules of the appellate courts because "Rule 25 has no immediate bearing on appellate procedure." *Moore's Federal Practice*, 2d Ed., p. 514. The Court so specifically held in *McComb* v. *Row River Lumber Co.*, 177 F. 2d 129 (C. A. 9, 1949).

POINT III

Even if Rule 25(c) were to apply, there is no "transfer of interest" in the instant case.

In order to determine whether Sabbatino's interest in this proceeding was transferred to C.A.V., we must first determine the interest of Sabbatino. He was not defending an action brought against him for money damages; plaintiff did not seek to hold him liable for the wrongful conduct of Farr. The only relief sought against Sabbatino was a dissolution of the receivership or, alternatively, an injunction to prevent Sabbatino from exercising any power under that receivership. The District Court said, at R. 133, 134, that petitioner sought to recover from Farr or the receiver, but this is inaccurate, as a reading of the complaint will reveal (R. 10).

As a result of the independent proceedings in the New York State Supreme Court, the receivership was terminated, at the suit of C.A.V.

What then is the interest of the Receiver which C.A.V. claims has been transferred to it? C.A.V. describes no such interest because none exists. The interest which C.A.V. describes in its application for relief is that of a guarantor or indemnitor of respondent Farr; Sabbatino had no such interest in this law suit, and could transfer none. Much of what C.A.V. says in its application may be factually correct. But however these facts may be interpreted, they cannot possibly spell out any transfer of interest from Sabbatino to C.A.V.

CONCLUSION

Motion of C.A.V. for leave to be substituted as respondent in the place and stead of Peter L. F. Sabbatino, as Receiver should be denied.

Respectfully submitted,

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Dated: October 16, 1963.